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UTAH COURT OF APPEALS
BRIEF

UTAH
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IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH,<br><br>Plaintiff and Appellee,<br><br>vs.<br><br>KAREN MAAS,<br><br>Defendant and Appellant. | DOCKET NO. 981654<br><br>Case No. 981654-CA<br><br>Priority No. 2 |

# BRIEF OF APPELLEE

AN APPEAL FROM A JUDGMENT OF CONVICTION FOR FALSELY SIGNING EVIDENCE OF FINANCIAL CARD TRANSACTION, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-506.1(4) (SUPP. 1997), UNLAWFUL USE OF FINANCIAL TRANSACTION CARD, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-6-506.2(1) (1995), AND PROPERTY OBTAINED BY UNLAWFUL FINANCIAL TRANSACTION CARD CONDUCT, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-6-506.4 (1995), IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH, GRAND COUNTY, THE HONORABLE LYLE ANDERSON PRESIDING

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Utah Court of Appeals
JUL 19 1999
Julia D'Alessandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### STATE CASES

**CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| **STATE OF UTAH,**<br>**Plaintiff and Appellee,**<br>**vs.**<br>**KAREN MAAS,**<br>**Defendant and Appellant.** | **Case No. 981654-CA**<br>**Priority No. 2** |

# BRIEF OF APPELLEE

## STATEMENT OF JURISDICTION

The defendant, Karen Maas, appeals from a judgment of conviction for Falsely Signing Evidence of Financial Card Transaction, a third degree felony, in violation of Utah Code Ann. § 76-6-506.1(4) (Supp. 1997), Unlawful Use of Financial Transaction Card, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-506.2(1) (1995), and Property Obtained by Unlawful Financial Transaction Card Conduct, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-506.4 (1995). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

## STATEMENT OF THE ISSUE

The following issue is presented to the Court for review, together with the respective standard of appellate review:

Issue on Appeal. Did defendant waive her claim that the prosecutor improperly used her response to the investigating officer's question as to whether or not she wished to talk to him?

Standard of Review. Where "'a party through counsel has made a conscious decision to refrain from objecting or has [otherwise] led the trial court into error, [the court] will then decline to save that party from error,'" even under the "plain error" doctrine. *State v. Winward*, 941 P.2d 627, 635 (Utah App. 1997) (quoting *State v. Baker*, 791 P.2d 155, 158 (Utah 1989)).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The interpretation of the following constitutional provisions, statutes, or rules are determinative of the appeal or of central importance to the appeal:

U.S. Const. amend. V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

U.S. Const. amend. XIV, § 1:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

## STATEMENT OF THE CASE

### SUMMARY OF PROCEEDINGS BELOW

Defendant was charged by Information with (1) Falsely Signing Evidence of Financial Card Transaction, a third degree felony, in violation of Utah Code Ann. § 76-6-506.1(4) (Supp. 1997), (2) Unlawful Use of Financial Transaction Card, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-506.2(1) (1995), and (3) Property Obtained by Unlawful Financial Transaction Card Conduct, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-506.4 (1995). R. 1-3. Following a one-day jury trial, defendant was convicted on all three counts as charged. R. 101-103. Defendant was sentenced to an indeterminate term of zero-to-five years in the Utah State Prison on the felony count and to two concurrent six-month jail terms on the misdemeanor charges. R. 111. The trial court stayed the sentences and placed defendant on probation for 36 months, the terms of which included a 30-day commitment in the Grand County Jail. R. 111. Defendant timely appealed. R. 117-119.

### SUMMARY OF FACTS

One afternoon in December 1997, Robert Prickett went to the Alco Discount Store in Moab to do some Christmas shopping. T. 14. After spending about 15 minutes in the store, he purchased light bulbs, sensor lights, garbage bags, and Christmas lights totaling $11.48. T. 24. Mr. Prickett made the purchase with his credit card at register 3 where defendant was working. T. 25, 28-29, 78. Rather than swiping the credit card through the magnetic slot, defendant entered Mr. Prickett's credit card number manually at or near 3:26 p.m. T. 22, 81.

After making the purchase, defendant returned the credit card to Mr. Prickett and he left the store. T. 15-16.

Approximately one-half hour later, another charge was made on Mr. Prickett's credit card at register 3. T. 21, 23. The charge was for a camping set totaling $211.49. T. 21, 23. The signature of Mr. Prickett on the credit card slip was not his signature. T. 17. Mr. Prickett did not purchase the camping set, nor did he authorize anyone to use his credit card. T. 15, 79. Three and one-half weeks later, defendant pawned the camping set purchased with Mr. Prickett's credit card, together with some jewelry and a television set. T. 37-38, 74-75.

## SUMMARY OF ARGUMENTS

Defendant's sole claim on appeal is that her right to a fair trial was denied as a result of testimony of, and reference in rebuttal to, defendant's response to the investigating officer's question as to whether or not she wished to talk to him about the case. Defendant's reply to Deputy Neal's question was in two parts: First, she responded, "Why, you have everything anyway." Immediately thereafter, she responded, "No, I don't want to talk to you." However, defendant waived any challenge on appeal because she declined the court's offer to give a curative instruction and failed to object to the prosecutor's remarks in rebuttal.

In any event, the first statement was not an invocation of her right to remain silent, and therefore, eliciting testimony of the same does not undermine her right. Testimony of the second statement, which was an invocation of her Fifth Amendment right, was not used to undermine her right to remain silent but was only a circumstance surrounding the deputy's investigation. Finally, reference in rebuttal to defendant's reply was used not to infer guilt

from her silence, but rather to point out a prior incriminating statement of defendant implying that the police had everything by way of evidence against her anyway.

## ARGUMENT

Defendant claims on appeal that she was denied a fair trial because her post-*Miranda* silence was used against her. Aplt. Brf. at 1. Specifically, defendant contends that the prosecutor improperly elicited at trial her refusal to talk to Deputy Neal and then improperly used that refusal during rebuttal. However, as discussed below, defendant waived any challenge to the use of the statement, and, in any event, the State did not use defendant's post-*Miranda* silence against her.

### I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.

Police Contact with Defendant. During the course of Deputy Neal's investigation, he went to defendant's home to speak with her. T. 47. Deputy Neal testified that he identified himself and explained that he was investigating the misuse of a credit card. T. 48. Deputy Neal explained to defendant all the evidence he had gathered to that point. He then advised her of her rights and read her a waiver of those rights.[1] When Deputy Neal asked defendant if she wished to talk to him, she responded, "Why, you have everything anyway? "No, I don't want to talk to you." T. 48. Thereafter, Deputy Neal did not question defendant but left the residence. *Id.*

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[1]Although Deputy Neal does not expressly state that he advised defendant of her rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), it appears likely that the rights to which he referred were in fact the *Miranda* rights. Accordingly, the State will treat defendant's subsequent statements to Deputy Neal as post-*Miranda* statements.

Proceedings at Trial. At trial, defense counsel objected on Fifth Amendment grounds to any questioning regarding Deputy Neal's attempts to interview defendant. T. 47-48. After the State rested its case, the trial court revisited defendant's objection and concluded that while the first statement, "Why, you have everything anyway," was admissible, the second statement, "No, I don't want to talk to you," should not have been admitted. T. 50.

The trial court offered to give a curative instruction to the jury, but defense counsel declined. T. 50. Instead, on direct examination, defendant explained her refusal to speak to Deputy Neal indicating that she "didn't feel there was anything [she] could say at the moment." T. 77. She further explained that in light of the documents he had gathered, "the way it added up, [she] just didn't think that [she] should say anything at the moment, that [she] should seek counsel or do something." T. 77.

The State did not cross-examine defendant regarding her decision to remain silent nor did the State refer again to defendant's second statement invoking her right to remain silent. During the State's rebuttal, the prosecutor did allude to the first statement, incorrectly quoting defendant as having said, "No, you have everything anyway." T. 111. However, defendant did not object when the prosecutor misquoted her statement.

## II. DISCUSSION AND ANALYSIS

### A. Defendant Waived Her Claim that the Prosecutor Improperly Used Her Statements to Deputy Neal.

Relying on the factors articulated in *Morrison* and *Reyes*,[2] defendant argues that the court's failure to give a curative instruction supports her claim that she was prejudiced by the testimony referencing the exercise of her right to remain silent and the prosecutor's alleged comment thereon. Aplt. Brf. at 21. Although the trial court initially denied defendant's objection to the testimony, it subsequently offered to instruct the jury to disregard testimony about defendant's second statement. T. 50. Defense counsel declined the court's offer, noting that although he didn't want to waive the argument, he "[didn't] want to point it out to the jury again either" because "it would just bring more harm" if he did so. T. 50. Defendant's claim now on appeal seeking reversal for the trial court's failure to give a curative instruction is tantamount to invited error. It is well settled that "a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993). The invited error doctrine preserves the "long-established policy that the trial court should have the first opportunity to address the claim of error." *Id.*

Having failed to allow the trial court to correct its own mistake, defendant waived her right to challenge it on appeal and cannot now claim error where the court offered to mitigate

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[2]As discussed below, the decisions in these cases were largely abrogated under *Harmon*.

any damage through a curative instruction.[3] Where "'a party through counsel has made a conscious decision to refrain from objecting or has [otherwise] led the trial court into error, [the appellate court] will then decline to save that party from error,'" even under the "plain error" doctrine. *Winward*, 941 P.2d at 635 (quoting *Baker*, 791 P.2d at 158)).[4] A similar claim was addressed in *Harmon*. In that case, as in this case, the trial court offered to give a curative instruction regarding the elicitation of testimony about the defendant's silence. *Harmon*, 956 P.2d at 269. Harmon's defense counsel also declined the instruction because he did not want to draw the jury's attention to the statement. *Id.* The Supreme Court held that "[b]ecause no curative instruction was given, [it had] no basis for review, and [the court] decline[d] to speculate as to the effect an instruction may or may not have had on the jury." *Id.* Likewise, because defendant declined, for strategic reasons, the court's offer of a curative instruction, this Court has no basis for review.

Defendant also argues that the prosecutor's comments in rebuttal constituted a *Doyle* violation. However, just as defendant waived her right to challenge the testimony on appeal because she declined the court's offer to give a curative instruction, she also waived her right to challenge any improper reference by the prosecutor in rebuttal because she failed to object

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[3]The trial court incorrectly indicated that counsel was not giving up any objection he made beforehand. T. 50.

[4]Notwithstanding defendant's decision not to draw the jury's attention to her silence through a curative instruction, she nevertheless later explained her silence on direct, testifying that she "didn't feel there was anything [she] could say at the moment. Seeing that these pieces of information, the way it added up, [she] just didn't think that [she] should say anything at the moment, that [she] should seek counsel or do something." T. 77.

and seek a curative instruction. In *Winward*, the prosecutor pointed out to the jury that the defendant did not put his attorney on the stand, apparently to testify as to why the defendant sought counsel before talking with the investigator. 941 P.2d at 632, 634. This Court "decline[d] to address the propriety of the prosecutor's closing argument because appellant made a conscious tactical decision not to object and obtain a curative instruction at trial, thus waiving the right to review." *Id.* at 634-35. This Court refused to consider the issue under the plain error doctrine because defendant had made a conscious decision to refrain from objecting "that would have allowed the trial court 'to mitigate any damage done by the prosecutor's comments.'" *Id.* at 635 (quoting *State v. Hales*, 652 P.2d 1290, 1292 (Utah 1982)).

Defendant's counsel was clearly cognizant of the potential harm engendered from an improper use of defendant's silence. He had already objected to any testimony about Deputy Neal's attempt to interview defendant. T. 47. Then, when the trial court offered to give a curative instruction once it heard the testimony, defense counsel made the tactical decision to decline the trial court's offer of a curative instruction, reasoning that it would do more harm than good. T. 50. Accordingly, it is fair to say that counsel's failure to object to the prosecutor's vague, at best, reference to defendant's silence was a tactical decision to not draw the jury's attention to her silence. As such, defendant is foreclosed from challenging the remark on appeal.

### B. Even If Defendant Had Preserved Her Claim on Appeal, the Prosecutor's Use of Her Response Did Not Undermine Her Right To Remain Silent.

Assuming arguendo that defendant had preserved her claim on appeal, the prosecutor did not improperly use her response to Deputy Neal, and, therefore, she was not denied a fair trial. The warnings mandated by *Miranda* "require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation." *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244 (1976). If a suspect knowingly and intelligently waives those rights, police may proceed with interrogation. *State v. Archuletta*, 850 P.2d 1232, 1238-39 (Utah 1993). If, however, a suspect chooses to exercise those rights, the police may not question the accused "unless [he] 'initiates further communication, exchanges, or conversations with the police.'" *Id.* at 1239 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85 (1981)). The Fifth and Fourteenth Amendments assure that "when a person invokes his constitutional rights, the prosecution should not comment thereon, nor so use it in any way that will tend to impair or destroy that privilege." *State v. Urias*, 609 P.2d 1326, 1328 (Utah 1980).

The lodestar decision regarding the use of a defendant's post-*Miranda* silence at trial is *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). The issue in *Doyle* was "whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings." *Id.* at 611, 96 S.Ct. at 2241. As in *Doyle*, the defendant in

this case declined to speak with the investigating officer, but then offered an exculpatory explanation at trial. Unlike *Doyle*, the prosecutor in this case did not cross examine defendant in any manner regarding her decision not to talk to the investigator. Nevertheless, the analysis in *Doyle* has been applied to any improper use of a defendant's post-*Miranda* silence, whether through direct examination of a government witness, cross-examination of the defendant, or reference in closing.

In *Doyle*, the defendant claimed that he had been framed by a third party. *Id.* at 613, 96 S.Ct. at 2242. On cross-examination, and in an effort to undermine the defendant's claim that he was framed, the prosecutor repeatedly questioned the defendant as to why he had not told the investigating officer about the alleged frame-up when he was arrested. *Id.* at 613-14, 96 S.Ct. at 2242-43. The Court concluded that the questioning was improper, holding that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618, 96 S.Ct. at 2245. Thus, "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial'" *Greer v. Miller*, 474 U.S. 284, 291, 106 S.Ct. 634, 638 (1987) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 923 (1983)).

Since *Doyle*, several Utah Supreme Court cases have discussed in some depth the use of a defendant's post-*Miranda* silence at trial. The most recent of these decisions is *State v. Harmon*, 956 P.2d 262 (Utah 1998). In that case, the Utah Supreme Court expressly held

that "the mere mention that a defendant invoked his constitutional rights does not *prima facie* establish a due process violation." *Id.* at 268. The *Harmon* court observed:

> "*Doyle* and the cases applying the rule against using a defendant's post- arrest silence against him center the constitutional inquiry around *the particular use* to which the post-arrest silence is being put. In other words, we must look at the circumstances in which a criminal defendant's post-arrest silence or request for counsel is revealed in court in order to determine whether the purposes underlying the rule in *Doyle* have been undermined.

*Id.* (quoting *Lindgren v. Lane*, 925 F.2d 198, 202 (7th Cir. 1991) (emphasis in original).

Although defendant acknowledges the holding in *Harmon*, *see* Aplt. Brf. at 8, she gives short shrift to the principles articulated by that court, relying instead on a series of decisions in this Court that applied a different and far higher standard of *Doyle* error. For example, defendant relies on this Court's statement in *State v. Byrd*, 937 P.2d 532, 535 (Utah App. 1997), that "'virtually any description of defendant's silence following arrest and *Miranda* warning will constitute a *Doyle* violation.'" Aplt. Brf. at 12. This statement is in direct conflict with the later *Harmon* decision. Moreover, the statement, which was quoted from a federal court of appeals case, was actually taken from Justice Brennan's dissent in *Greer*, where he argued for a much stricter standard than that adopted by the majority. *See Greer*, 483 U.S. at 770, 107 S.Ct. at 3111 (Brennan, J., dissenting).

The decisions in *State v. Reyes*, 861 P.2d 1055, 1057 (Utah App. 1993), and *State v. Morrison*, 937 P.2d 1293, 1296 (Utah App. 1997), upon which defendant also relies, essentially created a standard of obvious error for merely eliciting testimony of a defendant's post-*Miranda* silence. As *Harmon* makes clear, however, such is not the rule under *Doyle*.

The mere mention of a defendant's post-*Miranda* silence is not a per se *Doyle* violation. "[T]he State must, in some way, use the defendant's silence to undermine the exercise of those rights guaranteed by the Fourteenth Amendment before it can be said that such rights have been violated." *Harmon*, 956 P.2d at 268. If it is established that the State improperly used the defendant's silence against her, a new trial will only be required "[i]f the error is substantial and prejudicial to the extent that there is a reasonable probability that it affected the reliability of the trial outcome." *Id.*

Therefore, the threshold inquiry is whether or not defendant's response was an invocation of her right to remain silent. If so, the Court must determine whether or not reference to the invocation was used to undermine defendant's right to remain silent. If not, the inquiry stops. If so, the court must then determine whether defendant was prejudiced thereby. Defendant's response consisted of two separate statements. Defendant first responded, "Why, you have everything anyway." T. 48. This statement was immediately followed by the second statement, "No, I don't want to talk to you." *Id.* Due to the nature of these statements, they will be analyzed separately.

### 1. Defendant's First Statement Was Not an Invocation of Her Right to Remain Silent.

A fair reading of defendant's first statement leads to the conclusion that it was not an invocation of her right to remain silent, and therefore, testimony of the statement does not offend the principles articulated in *Doyle* and *Harmon*. The statement was an admission or declaration volunteered by defendant in response to Deputy Neal's attempt to determine

whether or not she wished to waive her rights. Defendant's response was similar to that of the defendant in *United States v. Johnson*, 56 F.3d 947 (8th Cir. 1995). In that case, as in this one, the investigating officer advised the defendant of his rights and then asked whether the defendant wished to waive those rights. *Id.* at 955. The court described the ensuing exchange between the defendant and investigating officer as follows:

> When Agent Vera read the waiver portion of the form to determine if Johnson wished to waive his rights, Johnson gave no direct answer but stated indirectly through use of profanity that he did not think he could help himself by talking. Agent Vera again attempted to determine if he wished to waive his rights, and Johnson asked, "if I tell you anything, you're just going to use it against me later, aren't you?" Agent Vera responded affirmatively. Johnson then refused to sign any forms but agreed to talk and stated, "you guys have all the evidence against me. I don't need to make any statement. I don't need to say anything." Faced with mixed signals, Agent Vera did not question Johnson about the crime but explained, "you have this opportunity to talk to me without a lawyer, to make a statement. You're the only person who can tell me about activities on January 28th of 1993." Johnson then responded in more certain terms, "I know I'm going to jail for a long time, the rest of my life, I can't help myself by talking to you." Johnson said nothing further, and questioning ceased.

*Id.* (citations to trial transcript omitted). The circuit court concluded that the statements were not a clear invocation of the defendant's right to remain silent. *Id.* As a result, the court upheld the trial court's denial of the motion to suppress the statements. *Id.*

The facts in this case present a much simpler scenario. Defendant's reply was made in two parts and in response to only one question posed by Deputy Neal as to whether or not defendant wished to talk to him. The first statement, like those made by the defendant in *Johnson*, cannot fairly be construed as an assertion of defendant's *Miranda* rights. Rather, the statement was more in the form of a rhetorical question from which the jury could infer

that defendant was conceding that it would not do her any good to speak with Deputy Neal because he already had the evidence against her. Accordingly, use of the first statement by the State to impeach defendant's explanation at trial is not prohibited by *Doyle* or *Harmon*.

### 2. Testimony of Defendant's Second Statement Was Not Used to Undermine Her Right to Remain Silent.

The State concedes that defendant's second statement, "No, I don't want to talk to you," was an unequivocal invocation of her right to remain silent. For this reason, Deputy Neal did not question defendant regarding the unauthorized credit card sale. As explained above, testimony regarding a defendant's invocation of her right to remain silent "*may* violate [] defendant's right against self incrimination" if improperly used by the prosecutor. *State v. Lairby*, 699 P.2d 1187, 1205 (Utah 1984) (emphasis added). The United States Supreme Court in *Greer* observed that "[w]hen a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important 'as an initial matter to place th[e] remar[k] in context.'" *Greer*, 483 U.S. at 765-66, 107 S.Ct. at 3109 (alteration in original) (quoting *Darden v. Wainwright*, 477 U.S. 168, 179, 106 S.Ct. 2464, 2471 (1986)). Upon doing so in this case, it becomes clear that the prosecutor did not elicit the testimony regarding defendant's silence to make any improper inferences.

At trial, defense counsel unsuccessfully objected on Fifth Amendment grounds to any questioning regarding Deputy Neal's attempts to interview defendant. T. 47-48. The trial court overruled the objection and allowed the State to elicit the testimony. T. 47-48.

Relevant portions of the bench conference, and the ensuing direct examination of Deputy Neal, are reproduced below:

**BENCH CONFERENCE**

Defense Counsel — I'm going to make an objection to any questions about whether or not he attempted to interview Ms. Maas. Ms. Maas refused to talk to him, and I think that would be an improper comment in exercising her Fifth Amendment right now at this time. She didn't exercise her Fifth Amendment right, but she did refuse to talk to Deputy—

Prosecutor — Well, the comment she made before refusing to comment is, I think, relevant, the way she—

The Court — What did she say?

Prosecutor — She said, Well, you have everything out, I don't have anything else to say.

The Court — I think I'll let that in.

Defense Counsel — We're on the record. My objection went on the record?

The Court — Yes, I think so.

**[DIRECT EXAMINATION OF DEPUTY NEAL CONTINUED]**

Prosecutor — After speaking to Mr. Prickett, did you contact Ms. Maas?

Deputy Neal — Yes, I did.

Prosecutor — Where?

Deputy Neal — At her residence on Williams Way.

Prosecutor — What was the nature of your conversation with Ms. Maas?

Deputy Neal — I met with [defendant], I identified myself. I explained the reason I was there was I was investigating misuse of a credit card. At that time I explained to Ms. Maas all the evidence I had acquired up to that time. At that time, I advised [defendant] of her rights, read her a waiver, asked her if she wanted to talk to me. She responded, "Why, you have everything anyway? No, I don't want to talk to you.

Prosecutor After she said that did you question her any further?

Deputy Neal No, I left.

Prosecutor That's all I have.

Defense Counsel No cross.

T 47-48.

The reason the prosecutor elicited her response is clear. He did not seek to exploit defendant's silence as invoked in the second part of her response, but rather he sought to draw the jury's attention to defendant's incriminating statement that Deputy Neal had all the evidence against her anyway. Accordingly, to the defense's argument that evidence of her response would be an improper comment on the exercise of her right to remain silent, the prosecutor replied that "the comment she made *before* refusing to comment [was] . . . relevant." T. 47 (emphasis added). He did not argue that the second part of the response could be used to draw any negative inference on defendant.

The response, although in two parts, was a single response to one question posed by Deputy Neal. As such, Deputy Neal's testimony regarding the second part of defendant's response was simply a circumstance surrounding his contact with defendant. As the Utah Supreme Court has recently observed,

> *Doyle* prohibits the prosecutor's use of defendant's silence to demonstrate guilt. However, we have held that, when an officer testifies to the circumstances surrounding an arrest, a part of which is defendant's silence, without further reference to or comment on the matter either in testimony or argument to the jury, there is no violation of that principle.

*State v. Bakalov*, 369 Utah Adv. Rep. 3, — (Utah 1999). *See also Urias*, 609 P.2d at 1328 (finding that testimony of the defendant's invocation of his right to remain silent, which was but part of the circumstances of the arrest, was not used to cast an inference of guilt). No other reference or comment was made by the prosecutor to this second statement. It is true that the jury was exposed again to the second part of defendant's reply when it asked to view the video tape of Deputy Neal's testimony. However, this was not elicited by the prosecutor and did not constitute different or additional testimony regarding silence. The second part of the response consisted of merely 8 words in approximately 6 pages of testimony. The jury also asked to view the video tape of the testimony of Robert Prickett. T. 114. Moreover, "defendant testified at trial, 'thereby offsetting or even dispelling any negative inference regarding [his] silence.'" *State v. Baker*, 963 P.2d 801, 806 (Utah App. 1998) (quoting *Lairby*, 699 P.2d at 1206).

### 3. Reference in Rebuttal to the First Statement Did Not Constitute a *Doyle* Violation.

Contrary to defendant's claim, the prosecutor's comments in rebuttal were directed not at defendant's silence, but rather at her implausible explanation at trial in contrast to her concession to Deputy Neal when he asked her if she would talk to him. Admittedly, the prosecutor did not accurately quote defendant's reply, indicating that she said, "No, you have everything anyway," T. 111, rather than "Why, you have everything anyway." T. 48. Again, however, the remark by the prosecutor must be placed in context of the impetus of his rebuttal and preceding argument. *See Greer*, 483 U.S. at 765-66, 107 S.Ct. at 3109.

Defendant testified that an average-looking man, about six feet tall, who appeared to be in his forties, purchased the camping set about 30 minutes after Mr. Prickett. T. 68, 79. She testified that he returned to the store three or four days later seeking a cash refund in order to pay a fishing ticket. T. 69, 80. Defendant indicated that after explaining that cash refunds could not be given on credit card purchases, she suggested that he either sell the camping set or pawn it. T. 71. Defendant then testified that because she had an interest in the camping set herself, she made arrangements to purchase the set from him at her home the following evening. T. 71-72. She then claimed that she pawned the camping set, together with a television set and some jewelry, about three and one-half weeks later to pay a fine for driving on a suspended license. T. 73-75.

In closing, defense counsel argued that defendant's explanation of events casted reasonable doubt on the State's case, requiring the jury to return a verdict of not guilty. T. 98-109. In rebuttal, the prosecutor argued:

> . . . . How did Karen get the camping equipment out of Alco, I don't know. Maybe she took it out to her car at the end of her shift, maybe she had a friend take it out for her. For that matter, maybe she had a friend who was a six-foot tall average looking 40ish guy that a couple of nights later brought it over to her house, her trailer. I don't know.
>
> Mr. Schultz asked you that somehow after Mr. Prickett bought his Christmas lights he went outside and threw his receipt away and somebody found his receipt and that's how 30 minutes later this average looking six-foot guy came in and bought that camping equipment. But remember, Karen said the person came in with the card. Not just the numbers, with the card.
>
> Mr. Schultz asks you, what would a crook or criminal whose going around defrauding people buy using their credit cards? What would they buy?

A big ticket item that's easily convertible to cash. Exactly. That's exactly what she did and, lo and behold, she converted it to cash.

* * *

In order for you to believe the defendant's story you have to disregard that there was just a 30-minute gap between Mr. Prickett's legitimate purchase and this fraudulent purchase that the defendant did using his card number which she would have had. You have to disregard the fact that Mr. Prickett got his card back and didn't authorize anybody else to use his card. You have to disregard that the defendant was the only person who could have taken Exhibit No. 1, the legitimate card, the receipt signed by Mr. Prickett, and also would have had access to Exhibit No. 2, which is the forged receipt. You would have to disregard that when Kim Neal went to the defendant's house, showed her the evidence, asked if she had anything to say about it she said, "No, you have everything anyway."

In order for you to believe her you would have to disregard all of that and you would have to buy the story that not only did this six-foot tall–I've forgotten it I've said it so many times–six foot tall average looking 40ish guy came in and made this fraudulent purchase with a card that Mr. Prickett still had on his person, but that same guy came back three days later and sold the same thing back to her and that she took it down and pawned it.

Mr. Schultz said to you, I don't know what credit card fraudulent purchasers look like. Well, I don't either. But I want you to go into the jury room and deliberate and I want you to come back out and say that we don't know what fraudulent credit card purchasers look like either, but in this case they look like the defendant, and Karen Maas you can't lie your way out of this, we find you guilty. Thank you.

T. at 109-12.

The prosecutor was not, as defendant now suggests, asking the jury to infer defendant's guilt from her silence. The prosecutor's argument was rather directed at the incredulous story offered by defendant at trial. The prosecutor contrasted that story not with reference to her refusal to speak with Deputy Neal, but rather with her concession that he

"already [had] everything anyway." T. 48. Undermining a defendant's testimony with a prior inconsistent statement does not violate *Doyle*. *See Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182 (1980).[5]

Any reference to defendant's silence by misquoting her statement was inadvertent and indirect at best. As held by the Utah Supreme Court, "[f]or a statement by a prosecutor to be constitutional error his remark must be 'manifestly intended or . . . of such character that a jury would naturally and necessarily construe it to amount to a comment on the failure of the accused to testify.'" *State v. Tucker*, 709 P.2d 313, 315 (Utah 1985) (quoting *State v. Nomeland*, 581 P.2d 1010, 1011 (Utah 1978)) (other citations omitted). *See also State v. Bartley*, 784 P.2d 1231, 1237-38 (Utah App. 1989). When the prosecutor's remark on defendant's first statement is viewed in the context of not only his rebuttal, but also his closing argument,[6] it cannot be said, as defendant contends, Aplt. Brf. at 19-20, that the jury

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[5]In *Anderson*, the Supreme Court observed: "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson*, 447 U.S. at 408, 100 S.Ct. at 2182.

[6]After explaining the evidence introduced by the State, the prosecutor attacked defendant's theory of the case:

"Now, having this evidence against the defendant, the defendant has to come up with what I am calling fancy, she has to use her imagination. And not only does she come up with a story of why Mr. Prickett's card had gone through her register twice in 30 minutes, and she comes up with a story that somebody bought that, it's the only one she ever sold, that somebody, it's this average looking 40ish guy that's six feet tall that doesn't live here, but had been around three or four days because he had to pay a fishing ticket, he came through and he's the one and he charged it on a credit card and bought that. He picked it up later because it was too heavy for him to lift.

would "naturally and necessarily" construe it to be a comment on the defendant's failure to testify. *Id.* Instead the prosecutor's remarks merely pointed to defendant's prior statement that the police had everything already which was inconsistent with her explanation at trial. Accordingly, no *Doyle* violation occurred.

**C. Any Error, If Any, Was Harmless.**

Because the State did not use defendant's silence to undermine her rights under the Fifth and Fourteenth Amendments, the Court need not determine whether or not defendant was prejudiced. *See Harmon*, 956 P.2d at 268. Even so, any error, if any, was insubstantial and did not prejudice defendant "to the extent that there is a reasonable probability that it affected the reliability of the trial outcome." *Id.* Defendant claims that because the evidence was circumstantial, it was not overwhelming. Aplt. Brf. at 21-22. This assertion is simply not true. Circumstantial evidence can be as persuasive as direct evidence. *See State v.*

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Now, maybe that might possibly hold water except for the fact that Mr. Prickett said he got his card back after he charged his Christmas lights so that couldn't have. There wasn't any 40ish six-foot man that came through and bought that. He couldn't have because Mr. Prickett had his card back and Mr. Prickett didn't buy that.

But not only does she use her imagination and come up with that bunch of the story, but two weeks later she's caught with the merchandise, the very thing that was charged by this mysterious man. So not only did this mysterious man come through her cash register, have Mr. Prickett's card, which he couldn't have had because Mr. Prickett had it, forged Mr. Prickett's name, but, Gosh, he sold me the camping equipment because he wanted to trade it back in and get cash.

Is that reasonable? That's your decision. That's what this whole day out of all of our lives boils down to is reasonableness. If you believe that's reasonable, well, you should find her not guilty. If you don't believe that's reasonable, you should find her guilty."
T. 97-98.

*James*, 819 P.2d 781, 800 (Utah 1991) (Howe, J., concurring and dissenting). Although the State's evidence was circumstantial, it was compelling.

It was established that defendant was working cash register 3 on the day in question and that no one else worked that register. T. 25, 28-29. Defendant conceded that she was working the register that day. T. 78. Mr. Prickett purchased various items at the register with his credit card. Mr. Prickett got the credit card back. T. 24. Once Mr. Prickett had made the purchase through his credit card, defendant had access to his credit card number and consequently had the ability to make charges to his credit card by entering the card number manually and signing his name. T. 33-34. Approximately 30 minutes later, a camping set was charged to Mr. Prickett's credit card. T. 21, 23. Mr. Prickett did not purchase the camping set. He did not authorize anyone else to use his credit card. Moreover, the signature on the credit card slip pertaining to the camping set was forged. *See* T. 15, 17, 78. Three and one-half weeks later, defendant pawned the camping set for $360.00. T. 37-38, 74-75.

Faced with overwhelming evidence of guilt, defendant explained that (1) she purchased the camping set from an unknown man who had purchased the set using Mr. Prickett's credit card after the man tried to return the set three to four days later for a cash refund, and (2) she then pawned it for $360 to pay a fine for driving on a suspended driver's license. T. 68-75, 79-80. Defendant's explanation, in the light of overwhelming evidence, is "'transparently frivolous'" and implausible. *Fields v. Leapley*, 30 F.3d 986, 991 (8th Cir. 1994) (citations omitted). Moreover, it was inconsistent with her statement that Deputy Neal

had "everything anyway" as it pertained to the evidence. T. 48. Although her boyfriend confirmed defendant's claim that she had obtained the camping set as a Christmas present for him, he could not confirm her story as to how she came into possession of the set. T. 63. Indeed, her boyfriend testified that she never told him that she bought it from the man. T. 63. Nor was her testimony otherwise corroborated by the man who purchased the set or anyone else. *See Velarde v. Shulsen*, 757 F.2d 1093, 1095-96 (10th Cir. 1985). As such, any error, if any, was insubstantial and did not prejudice defendant.

## CONCLUSION

For the reasons and given the facts set forth above, the Court should affirm defendant's convictions.

Respectfully submitted this 19th day of July, 1999.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 1999, I caused to be served two copies of the attached Brief of Appellee upon the respective parties by causing the same to be mailed, via first class mail, postage prepaid, to the following:

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